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UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991	Case No:	IT-08-91-T
	Date:	21 October 2009
	Original:	English

IN TRIAL CHAMBER II

Before: **Judge Burton Hall, Presiding**
Judge Guy Delvoie
Judge Frederik Harhoff

Registrar: **Mr. John Hocking**

Decision of: **21 October 2009**

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

DECISION DENYING THE PROSECUTION MOTION FOR RECONSIDERATION OF THE ORDER LIMITING THE NUMBER OF WITNESSES IT MAY CALL AT TRIAL

The Office of the Prosecutor

Ms. Joanna Korner
Mr. Thomas Hannis

Counsel for the Accused

Mr. Slobodan Zečević and Mr. Slobodan Cvijetić for Mićo Stanišić
Mr. Igor Pantelić and Mr. Dragan Krgović for Stojan Župljanin

TRIAL CHAMBER II ("Trial Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 is seised of the "Prosecution motion for reconsideration of the Trial Chamber's Order limiting the number of witnesses the Prosecution may call at trial", filed confidentially on 8 September 2009 ("Motion"), whereby the Prosecution requests "that the Trial Chamber reconsider its order limiting the number of witnesses the Prosecution may call and allow the Prosecution the discretion to determine the number of witnesses it will present during its case-in-chief within the 212-hour time limit imposed by the Chamber."[1] In the alternative, the Prosecution requests that "the Chamber permit the Prosecution until 18 December 2009 to indicate which witnesses it will remove from its Rule 65*ter* witness list"[2]

I. PROCEDURAL HISTORY

1. At the Rule 65 *ter* conference on 24 August 2009, the pre-trial Judge invited the Prosecution to consider 180 hours for the presentation of its examination-in-chief.[3] On 31 August 2009, the Prosecution filed a submission stating that it required 292 hours. It also stated that if the Trial Chamber was "inclined to impose a time limit on the Prosecution's examination-in-chief [it requested] a more reasonable limit of 260 hours" ("Submission").[4]

2. At the pre-trial conference held on 4 September 2009, the Trial Chamber determined pursuant to Rule 73 *bis* of the Rules of Procedure and Evidence of the Tribunal ("Rules") that the Prosecution may have 212 hours for the presentation of its evidence-in-chief.[5] Additionally, the Trial Chamber determined that the Prosecution may call 131 witnesses and ordered it to file a revised final witness list by noon on 10 September 2009 ("Order").[6] The Prosecution then made oral submissions challenging the Trial Chamber's determinations and the feasibility of producing a reduced witness list within the time prescribed.[7] After having deliberated upon these submissions, however, the Trial Chamber affirmed its ruling.[8]

3. Following the filing of the Motion and in the face of apparent confusion expressed in e-mail correspondence to the Trial Chamber's staff, on 10 September 2009 the Legal Officer, upon the instruction of the Trial Chamber, sent an e-mail to the parties to clarify that the deadlines for that

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[1] Motion, para. 16.
[2] Motion, para. 2.
[3] Rule 65 *ter* conference, 24 Aug 2009, T. 281-282.
[4] Prosecution submission on the pre-trial Chamber's proposal for limiting the time available for the presentation of the Prosecution's case, 31 Aug 2009, paras 1, 32.
[5] Pre-trial conference, 4 Sep 2009, T. 90, 93.
[6] Pre-trial conference, 4 Sep 2009, T. 91, 93.
[7] Pre-trial conference, 4 Sep 2009, T. 93-96.
[8] Pre-trial conference, 4 Sep 2009, T. 117.

day remained in place. On the same date, the Prosecution filed its reduced list of witnesses "without prejudice to the Prosecution's Motion for Reconsideration and stay of this order".[9]

4. On 14 September 2009, the Defence of Mićo Stanišić and the Defence of Stojan Župljanin jointly responded ("Response"), submitting that the Motion is moot as a result of the e-mail sent on 10 September 2009, or, in the alternative, that it should in any event be denied.[10]

II. SUBMISSIONS

5. The Prosecution submits that prior to the pre-trial conference "the Chamber had indicated that while it was inclined to impose a time limit on the Prosecution's examination-in-chief, the Prosecution would have the discretion to decide how to present its evidence within that time limit" and that, therefore, the Submission only addressed the time limit issue.[11] Contrary to that indication, the Chamber then imposed a limit on the number of Prosecution witnesses without first hearing from the Prosecution on the matter which, the Prosecution submits, is contrary to Rule 73 *bis*(C) and thus gives rise to grounds for reconsideration.[12]

6. In the Prosecution's view, the Order "is flawed and unjust in several respects."[13] It contends that it is not necessary to limit the number of witnesses the Prosecution may call to ensure an expeditious trial because limiting the number of hours will require the Prosecution to remove a number of witnesses from its witness list and to present the evidence of other witnesses through alternative modes of testimony.[14]

7. The Prosecution also submits that, if the Order is aimed at eliminating irrelevant and redundant evidence, it is premature and arbitrary.[15] The Prosecution explains that neither the Chamber nor the Prosecution can engage in the necessary analysis of whether a witness' evidence is "*unique* from, *corroborative* of or merely *redundant* to other witness or documentary evidence" until the Prosecution has "adduced sufficient evidence at trial to familiarize the Chamber with the nature and scope of the crimes at issue" and the Defence has had the opportunity to cross-examine.[16] Therefore, it would be "highly imprudent for the Prosecution to eliminate cumulative evidence from its witness list at this early stage in the trial proceedings".[17] The Prosecution also

[9] Prosecution's reduced list of witnesses, with confidential annexes, 10 Sep 2009, para. 1.
[10] Joint Defence response to Prosecution motion for reconsideration of the Trial Chamber's order limiting the number of witnesses the Prosecution may call at trial, 14 Sep 2009, paras 2, 4.
[11] Motion, para. 4.
[12] Motion, para. 4.
[13] Motion, para. 5.
[14] Motion, para. 5.
[15] Motion, para. 6.
[16] Motion, paras 6-7 (emphasis in original).
[17] Motion, para. 7.

submits that the Order "is premature at this stage as [the Chamber] has not yet ruled on the Prosecution's third, fourth and fifth motions for judicial notice of adjudicated facts [or its] Rule 92*ter* and 92*quater* motions."[18] The Prosecution asserts that it must "carefully consider [the mode of testimony and extent that the witness' testimony is covered by adjudicated facts] in deciding whether it can eliminate a witness without jeopardizing its case".[19] It states that to require it to remove witnesses because the evidence is cumulative of other evidence would be inconsistent with Rule 92 *bis*(A)(i)(a), which includes as a factor in favour of admitting evidence in the form of a written statement or transcript, whether the evidence is "of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts".[20] In this respect, the Prosecution contends that "the examples provided by the Trial Chamber at the Pre-Trial Conference of witnesses it considered either irrelevant or redundant illustrate why it is untimely to make these determinations at this stage in the proceedings".[21]

8. The Prosecution submits that if the Chamber is minded to impose a limit on the number of Prosecution witnesses, it would be unfair to require it to make these determinations at this stage.[22] It requests the Chamber to allow the Prosecution to submit a list of its first 20 witnesses at this time and the remainder of its reduced witness list on 18 December 2009. It is argued that this would provide the Defence with ample time to adjust its defence accordingly.[23]

9. Lastly, the Prosecution argues that it "alone carries the burden of 'telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt'".[24] The Prosecution contends that forcing it to reduce its witness list at this stage of the proceedings will "significantly diminish the Prosecution's ability to meet this burden".[25]

10. The Defence responds that an e-mail was sent on 10 September 2009, which informed the Prosecution "that all orders issued by the Trial Chamber at the Pre-Trial Conference [...] 'remain in place'" and therefore the Motion has already been denied.[26] In the alternative, the Defence submits that the Motion must be denied because the ruling was made pursuant to the powers vested in the Chamber under Rule 73 *bis*, and that the Trial Chamber considered it "crucial that the final witness

[18] Motion, para. 13.
[19] Motion, para. 13.
[20] Motion, para. 7.
[21] Motion, paras 8-11.
[22] Motion, para. 14.
[23] Motion, para. 14.
[24] Motion, para. 15, quoting *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory decision on length of Defence case, 20 Jul 2005, para. 7.
[25] Motion, para. 15.
[26] Response, para. 2.

list is given [...] ahead of the start of trial".[27] Finally, the Defence submits that this is fundamental to a fair trial.[28]

III. APPPLICABLE LAW

11. A Trial Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases if " a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice".[29] The Appeals Chamber has held that "such particular circumstances include new facts or new arguments".[30]

IV. DISCUSSION

12. As a preliminary matter, and as indicated in court on 17 September 2009, the Trial Chamber considers that the e-mail sent on 10 September 2009, which was intended to assist the parties in view of the confusion they had expressed, did not determine or dispose of the Motion.[31]

13. Prior to issuing the Order, the Trial Chamber stated that it had "gone through each and every single statement that the Prosecution has submitted".[32] The Trial Chamber considers that these submissions by the Prosecution provided it with the information necessary to determine, pursuant to Rule 73 *bis*(C), that 131 witnesses is objectively adequate to permit the Prosecution to set forth its case in a fair and thorough manner. After the Trial Chamber's indication at the pre-trial conference that the Prosecution would be permitted to call 131 witnesses, the Trial Chamber then heard oral submissions from the Prosecution on the issue. Only after having considered and deliberated upon these submissions did the Trial Chamber affirm the Order. The Trial Chamber cannot, therefore, agree with the Prosecution's submission that the Prosecution was not, as required by Rule 73 *bis*(C), heard prior to the Trial Chamber's determination. While the Trial Chamber would, on this basis alone, deny the Motion, it notes that the Prosecution raises new arguments in the Motion. The Trial Chamber will, therefore, consider whether these arguments warrant, in the interest of justice, reconsideration of the Order.

14. The Prosecution argues that it is unnecessary to set a limit on the number of witnesses the Prosecution may call because there are other mechanisms which may be employed to ensure that

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[27] Response, para. 4, quoting Pre-trial conference, 4 Sep 2009, T. 117.
[28] Response, para. 4.
[29] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108*bis*.3, Decision on request of Serbia and Montenegro for review of the Trial Chamber's decision of 6 December 2005, confidential, 6 Apr 2006, fn. 40.
[30] *Prosecutor v. Stanislav Galić*, Case. No. IT-98-29-A, Decision on Defence's request for reconsideration, 16 Jul 2004, p. 2.
[31] 17 Sep 2009, T. 506.
[32] Pre-trial conference, 4 Sep 2009, T. 91.

the trial is expeditious and that irrelevant or redundant evidence is not heard. However, in the Trial Chamber's opinion the existence of the mechanisms referred to by the Prosecution does not prevent the Trial Chamber from exercising its authority pursuant to other rules. In fact, Rule 73 *bis*(C) specifically requires the Trial Chamber to determine both the number of witnesses the Prosecution may call and the time available to the Prosecution for presenting its evidence.

15. With regard to the Prosecution's argument that the Order was premature, it is sufficient to refer to the mandatory language of Rule 73 *bis*, which requires the Trial Chamber to make certain determinations at the pre-trial conference. It is the duty of the Trial Chamber, under Articles 20 and 21 of the Statute to ensure a fair and expeditious trial. Accordingly, Rule 73 *bis* was added to the Rules with the objective of "conducting trials more expeditiously without jeopardising respect for the rights of accused persons".[33] These rights require, as reflected in Rule 65 *ter*(E)(ii), that at an early stage of the proceedings, notice is provided to the accused of the witnesses to be brought against them in order to allow adequate time to prepare a defence and to ensure a fair trial. For this reason, it is insufficient for the Prosecution to submit a list of only the first 20 witnesses with the remainder not being submitted until much later. Such an approach would not be in conformity with the rights of the accused.

16. The Trial Chamber recognizes that the Prosecution has the burden of proving every element of the crimes charged beyond a reasonable doubt. However, the Trial Chamber cannot agree with the Prosecution's submission that reducing its witness list at this stage of the proceedings will significantly diminish its ability to meet this burden. A case such as this, in which the number of events and the structure of power and responsibility underlying the criminal charges cover a large territory and many victims, necessitates and justifies limitations in case presentation by the parties. Not every witness to every incident can be called. Rule 73 *bis*(C) is a mechanism mandated by the Rules by which the Trial Chamber can ensure that the Prosecution applies the necessary limitations in the presentation of its case.

17. As the Prosecution has noted, the Trial Chamber has not yet ruled on the Prosecution's third, fourth and fifth motions for judicial notice of adjudicated facts or its Rule 92 *ter* and Rule 92 *quater* motions. As these decisions relating to the admission of evidence are issued and the strategies of the Defence emerge, the Prosecution's evidentiary needs may evolve. It is for this reason that Rule 73 *bis*(F) provides a means for the Prosecution to request, *inter alia*, variation of the decision as to the number of witnesses that are to be called. This interplay between Rule 73 *bis*(C) and (F) creates the necessary balance between the Prosecution's right to prove beyond a reasonable doubt

its case against the accused and the accused's right to, and the Trial Chamber's duty to ensure, a fair and expeditious trial

18. Lastly, the Trial Chamber is of the view that, in arguing that requiring the Prosecution to remove witnesses from its list because they are redundant is inconsistent with Rule 92 *bis*, the Prosecution erroneously conflates two issues. Rule 73 *bis*(C) provides a mechanism for the Trial Chamber to control the amount of evidence to be presented. Rule 92 *bis*, on the other hand, is a mechanism to control the mode of the evidence to be admitted. Further, the Trial Chamber did not direct the Prosecution to remove specific witnesses from its witness list. In order to ensure that the evidence at trial is presented in a concentrated manner, the Trial Chamber noted, by way of example, the witnesses which, in its opinion, appeared to be redundant.[34] The Trial Chamber specifically left the final decision of which witnesses to remove from the witness list to the Prosecution.[35]

19. Having considered the new arguments raised in the Motion, the Trial Chamber is not satisfied that the Prosecution has demonstrated a clear error of reasoning in the Order which would require it to be reconsidered, or that it is necessary to do so in order to prevent an injustice.

V. DISPOSITION

20. For the foregoing reasons, and pursuant to Rule 73 *bis,* the Trial Chamber **DENIES** the Motion.

Done in English and French, the English version being authoritative.

Judge Burton Hall
Presiding

Dated this twenty-first day of October 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

[33] Fifth annual report of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991, 10 Aug 1998, para. 107.
[34] Pre-trial conference, 4 Sep 2009, T. 91-92.
[35] Pre-trial conference, 4 Sep 2009, T. 91-92. The Trial Chamber clarified that "in doing so, we are careful not to try and control the Prosecution's case. So we will not seek to tell you which witnesses you should knock off, but if I can use a few examples just for your illustration [...]"